LIBRARY

Office-Supreme Court, U.S.
FILED
JAN 18 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 756

ORION T. WHITING, JR., and LUCRETIA KILLINGS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

T. EMMET MCKENZIE
412 Fifth St., N.W.
Washington 1, D. C.
Counsel for Petitioners

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2-5
CONSTITUTIONAL PROVISIONS	5, 6
STATUTES INVOLVED	6-11
RULES OF CRIMINAL PROCEDURE	11-13
STATEMENT OF THE CASE	13-21
ARGUMENT	21-31
REASONS FOR ALLOWING OF WRIT	31
CONCLUSION	31-32
APPENDIX:	
Opinion	1A to 12A
Judgment	13A

Cases Cited

Alford v. U. S., 282 US 687, 75 L ed 625	30, 31
Gouled v. U. S., 255 US 298, —— S.Ct. 298, 65 L ed. 647	29
Greene v. McElroy, 360 UC 474, 3 L ed 2d, 1377, 79 S Ct. 1400	23
Ingram v. U. S., 360 US 672, 3 L ed 2d 1503, 79 S Ct. 1314	22
Miller v. U. S., 357 US 301, 2 L.ed 2d 1332, 78 S Ct. 1190	24, 25
Roviaro v. U. S., 353 US 53, 1 L ed. 2d, 639, 77 S Ct. 623	23
United States v. Calamaro, 354 US 351, 1 L ed 2d 1394, 77 S Ct. 1138	22

IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. .....

ORION T. WHITING, JR., and LUCRETIA KILLINGS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorables: The Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petitioners, Orion T. Whiting, Jr., and Lucretia Killings, pray that the writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit, entered December 19, 1962.

OPINION BELOW

The Opinion of the court below has been printed but not yet reported and is attached hereto at Appendix 1A to 12A and the judgment of the court below is attached at page 13A.

JURISDICTION

The jurisdiction of this Court is asserted under the provisions of 28 U.S.C. 1254 (1).

The judgment sought to be reviewed is dated December 19, 1962.

QUESTIONS PRESENTED FOR REVIEW

The instant prosecution charged, by information, violations of 26 U.S.C. 4401, 4411, 4412, 4901, 7203, 7262 and 7272; and C.F.R. Title 26 section 325.50; and Title 18, U.S.C. 2.

Where in such a case upon motion to suppress evidence seized upon execution of a search warrant the evidence and testimony establishes that—

The signatories to the affidavit purporting to authorize the issuance of a search warrant had no personal knowledge of any violation of the statutes in question—

In the execution of the warrant a federal marshal in possession of the warrant observing through a locked door the feet of some persons on a second floor, announced his identity and mission, waited from fifty to sixty seconds and then broke down the door with a sledge hammer to gain entrance not having been refused or denied the right to enter; and

Where simultaneously at another door, unlocked, an internal revenue agent, with a pistol exposed, ordered the owner of the premises to remain seated and quiet if she desired to avoid trouble and prevented and forbade her to open the door at which the marshal was standing;

I

Did the issuance of the warrant deprive petitioners of their constitutional guarantees against unreasonable

searches and seizures under Amendment IV., to the Constitution of the United States?

II

Did the execution of the warrant deprive petitioners of their constitutional rights against unreasonable searches and seizures under Amendment IV., of the Constitution of the United States and deny them the protection they had been guaranteed by 18 U.S.C. 3109?

III

Did the use of the testimony and evidence obtained during the search and seizure deprive petitioners of their rights not to be compulsory witnesses against themselves; and of their constitutional guarantee not to be deprived of liberty or property without due process of law in violation of the command of Amendment V., to the Constitution of the United States?

IV

Where on pre-trial motion to suppress evidence and testimony seized as stated supra, the signatories to the purported affidavit supporting the issuance of warrant stated their information tending to establish that petitioners were in violation of the applicable statutes—and not in violation of local gambling laws, only—was received from informants whom, it was claimed, without any identification, had been on a prior occasion reliable, was it error to refuse the request of petitioners to be informed as to the identity of such alleged informants, and did such ruling deprive petitioners of their rights to be confronted with the witnesses against them as provided in Amendment VI., to the Constitution of the United States?

V

Where at trial, petitioners objected to the introduction into the case of the testimony and evidence obtained during the search and seizure, supra, upon the grounds it had been obtained illegally and the court, First, stated he would hear testimony as to the admissability of the evidence to which objection had been made, and Second, subsequently summarily terminated the taking of such testimony upon the holding the ruling of the judge at pretrial hearing of a motion to suppress became inflexibly the law of the case and not subject to any further inquiry or review, did this refusal to make a judicial inquiry respecting admissability deprive the petitioners of their right to a fair trial under due process of law as guaranteed by Amendment V., to the Constitution of the United States?

VI

Where there was no evidence that the petitioner Lucretia M. Killings was more than a female person accompanying the petitioner Orion T. Whiting, Jr., and where during cross examination of a government witness testifying as an expert, at the pre-trial motion to suppress, he stated that in his opinion the petitioner Lucretia M. Killings was an employee or subordinate was it error for the trial court upon trial of the cause before the jury to forbid this witness to testify as to her capacity in the alleged lottery?

VII

Where at the conclusion of the case for the government the evidence established:

a. Neither petitioner had ever been known to have accepted a wager during the time limits involved;

b. Neither petitioner had ever been known to have paid off a wager during the time limits involved; was it error to deny petitioners' motions for judgments of acquittal? Did the ensuing opportunity, in fact absolute necessity, to require a jury verdict predicated upon suspicion, conjecture and guess deprive petitioners of their constitutional right to a fair trial under due process of law?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 4.—SEARCHES AND SEIZURES.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5.—RIGHTS OF PERSONS.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6.—CRIMINAL TRIALS.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTES INVOLVED

26 U.S.C. section 4401. TAXES ON WAGERING. IMPOSITION OF TAX.

(a) WAGERS.—There shall be imposed on wagers as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) AMOUNT OF WAGER.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) PERSONS LIABLE FOR TAX.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

26 U.S.C. 4411. IMPOSITION OF TAX.

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

Sec. 4412. REGISTRATION.

(a) REQUIREMENT.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for such tax under subchapter A, the name and place of residence of each such person.

(b) FIRM OR COMPANY.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) SUPPLEMENTAL INFORMATION.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this as may be needful to the enforcement of this chapter.

26 U.S.C. Sec. 4901. PAYMENT OF TAX.

(a) CONDITION PRECEDENT TO CARRYING ON CERTAIN BUSINESS.—No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering), 4461 (2) (coin operated gaming devices), 4721 (narcotic drugs), or 4751 (marihuana) until he has paid the special tax therefor.

(b) COMPUTATION.—All special taxes shall be imposed as of on the first day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for 1 year, and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.

(c) HOW PAID.—

(1) STAMP.—All special taxes imposed by law shall be paid by stamps denoting the tax.

(2) ASSESSMENT.—

For authority of the Secretary or his delegate to make assessments where the special taxes have not been duly paid by stamp at the time and in the matter provided by law, see subtitle F.

SUBTITLE F.

CHAPTER 63—ASSESSMENT

SUBCHAPTER A. In general.

SUBCHAPTER B. Deficiency procedures in the case of income, estate, and gift taxes.

SUBCHAPTER A—IN GENERAL

Sec. 6201. Assessment authority.

Sec. 6202. Establishment by regulations of mode or time of assessment.

Sec. 6203. Method of assessment.

Sec. 6204. Supplemental assessments.

Sec. 6205. Special rules applicable to certain employment taxes.

Sec. 6206. Cross references.

Sec. 6201. ASSESSMENT AUTHORITY.

(a) AUTHORITY OF SECRETARY OR DELEGATE.—The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) TAXES SHOWN ON RETURN.—The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made under this title.

(2) UNPAID TAXES PAYABLE BY STAMP.—

(A) OMITTED STAMPS. — Whenever any article upon which a tax is required to be paid by means of a stamp is sold or removed for sale or use by the manufacturer thereof or whenever any transaction or act upon which a tax is required to be paid by means of a stamp occurs without the use of the proper stamp, it shall be the duty of the Secretary or his delegate, upon such information as he can obtain, to estimate the amount of tax which has been omitted to be paid and to make assessment therefor upon the person or persons the Secretary or his delegate determines to be liable for such tax.

* * * *

Sec. 6203. METHOD OF ASSESSMENT.

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary of his delegate in accordance with rules or regulations prescribed by the Secretary or his delegate. Upon request of the taxpayer, the Secretary or his delegate shall furnish the taxpayer a copy of the record of the assessment.

Title 26 U.S.C. Sec. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return,

keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

SAME. Sec. 7262. VIOLATION OF OCCUPATIONAL TAX LAWS RELATING TO WAGERING—FAILURE TO PAY SPECIAL TAX.

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

Title 18, section 2. PRINCIPALS.

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

Title 18, section 3109. BREAKING DOORS OR WINDOWS FOR ENTRY OR EXIT.

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

RULES OF CRIMINAL PROCEDURE. Rule 41. Search and Seizure.

(a) AUTHORITY TO ISSUE WARRANT. A search warrant authorized by this rule may be issued by a judge of the United States or of a state or terri-

torial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) GROUNDS FOR ISSUANCE. A warrant may be issued under this rule to search for and seize any property—

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C. section 957.

(c) ISSUANCE AND CONTENTS. A warrant may issue only on affidavit sworn to before the Judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

(d) EXECUTION AND RETURN WITH INVENTORY. The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person

from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) MOTION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissable in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless the opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

(f) RETURN OF PAPERS TO CLERK. The judge or commissioner who has issued a search warrant shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(g) SCOPE AND DEFINITION. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects.

STATEMENT OF THE CASE

On June 22, 1960, Special Agents Placido F. Ridolfi and Arnold G. Bedingfield employed by the Internal Revenue service of the federal treasury department appeared before United States Commissioner Ernest Volkart to apply for search warrant.

They submitted an affidavit subscribed and sworn to by each and both.

With the exception of testimony received during trial of petitioners relating to articles seized upon execution of the warrant issued this affidavit spells out the complete and entire case for the government.

The brief prefatory statement in the aforesaid affidavit reads as follows:

> After receiving information from a source that has proved reliable in the past that Orion T. Whiting and others were engaged in the business of operating a lottery, and that the wagers were all transported by automobile to a house located on Leeland Road, in Prince George's County, Maryland, where the wagers are asserted and tallied, Special Agents Placido F. Ridolfi and Arnold G. Bedingfield were assigned to make an investigation.

> Orion T. Whiting is known by reputation based on information furnished by informants who have proved reliable in the past to be engaged in the numbers lottery as a backer. It is general knowledge within the Morals Division of the Metropolitan Police Department, Washington, D. C., that Orion T. Whiting is a backer in the numbers racket, and information furnished by that office discloses that their files contain many complaints relating thereto. Orion T. Whiting has previously admitted to agents of the Internal Revenue Service that he was engaged in the numbers lottery and that several years ago he filed Form 11C (Application for Occupational Tax Stamp —Wagering) but did not, supply full information and, as a result, did not receive the stamp.

The body of the affidavit submitted to the Commissioner, Bedingfield and Ridolfi, affiants, narrated observations made on June 1, 1960; June 3, 1960; June 14, 1960; June 15, 1960; June 16, 1960; and June 20, 1960.

The recitation of observations made June 20, 1960 amply and accurately portrays the observations made on each and every day, and reads as follows:

> On June 20, 1960, at about 2:52 p.m., Special Agents Bedingfield and Ridolfi observed Orion T. Whiting driving a Ford automobile, Maryland tags FL 91-34 pick up Lucretia M. Killings in the vicinity of 14th Street and Saratoga Avenue, N.E., Washington, D. C. and proceed to the Suitland Shopping Area located on Suitland Road, Suitland, Maryland, where ne parked facing the shopping area. On June 20, 1960, at about 3:26 p.m., Special Agents Bedingfield and Ridolfi observed Carl Joseph Wilson driving a blue Plymouth Coupe, District of Columbia tags GP 286, with the same unidentified colored girl as a passenger, park in the same parking area about one block east of the location where Whiting and Killings were parked. The unidentified colored girl immediately alighted with a large brown paper bag folded at the top and walked to and entered the Ford automobile Maryland tags FL 91-34, occupied by Whiting and Killings. Whiting immediately

> drove east on Suitland Road to the intersection of Silver Hill Road, where he turned left and stopped The unidentified colored girl alighted from the previously described Ford automobile without the large brown paper bag and Whiting and Killings proceeded on Silver Hill Road in the direction of Marlboro Pike. On June 20, 1960, at about 3:54 p.m., Special Agents Bedingfield and Ridolfi observed Orion T. Whiting driving the same Ford automobile with Lucretia M. Killings as a passenger, enter the driveway to the previously described house on Leland Road and disappear into the garage.

In a proceeding paragraph in the aforesaid affidavit the Carl Joseph Wilson referred to above was described as one who

> was charged with setting up a gaming table and permitting gaming in the District of Columbia on December 11, 1948, and subsequently convicted on the charge of permitting gaming.

Upon consideration of the allegations thus made in the affidavit purporting to support the application for search warrant a United States Commissioner's warrant issued.

Upon execution of the warrant a substantial quantity of documents, two adding machines, and other matter which is best defined as paraphernalia suitable for use in keeping records of gaming transactions was seized.

There was no arrest of the petitioners prior to the seizure, during the seizure, or at the scene of the seizure.

Arrest took place some several hours later and some thirty to forty miles distant when petitioners were brought before a United States Commissioner who set bail and a date for a hearing.

Ergo, it will immediately appear that no search and seizure was made pursuant to a valid arrest. The arrest —without arrest warrant—followed the search and seizure.

Date of the raid was June 24, 1960.

On August 4, 1960, petitioners were given a hearing before United States Commissioner H. Allen Mezger, in Baltimore, Maryland, and Special Agent Ridolfi testified for the government.

At the conclusion of his testimony—no other person testifying—petitioners moved that they be discharged upon the ground there was no proof of any acceptance of a wager from any person by any person at any time or place set forth in the complaint.

As to petitioner Killings it was further urged, as reason for dismissing as to her that the following demonstrated her right to be discharged:

> (Tr. 27—U. S. Commissioner's Hearing—August 4, 1960)
>
> Q. (By Mr. McKenzie) Did you have any knowledge at that time as a result of your observation that Lucretia Killings was engaged in the business or occupation of accepting wagers or bets from anybody?
>
> A. Well, the only thing we knew that she was associated with Whiting.

The Commissioner ruled the government had established probable cause and held the petitioners for further action.

On August 29, 1960, a four count information charging petitioners with receiving wagers without having paid the special occupational wagering tax; willful failure to pay the special occupational wagering tax; failure to register with the District Director of Internal Revenue; and willful failure to supply information.

On January 26 and January 29, 1962, before Northrup, J., and in the District Court of the United States, Baltimore, Maryland, a hearing was had on motions to suppress and motion filed as a plea in bar. All motions were denied.

Upon hearing of the motion to suppress petitioners called Agent Ridolfi and he testified substantially as follows:

That prior to the time of day petitioner Whiting was observed to meet petitioner Killings he had no knowledge or from whence either or both had come; that he had no knowledge whether either or both had prior to such observation accepted any wager from any person at any place; that he had no knowledge that either or both had wagers in their possession at that time; that he had no knowledge from whence the automobile driven by Carl Wilson had come; no knowledge from whence the unidentified colored girl had come; no knowledge whether Carl Wilson had accepted a wager from any person at any place at any time; that he had no knowledge that the unidentified colored girl had accepted a wager from any person at any place or time; that he had no knowledge that the brown paper bag referred to in the supporting affidavit for search warrant, contained any wagers or anything else; that he did not know where it came from originally.

Continuing, and testifying as an expert with eighteen years of experience in such work with the Treasury Depart, the witness was asked by the District Attorney:

> Q. From your experience, what would be expected to take place once a bag, assuming that there were wagers that were placed in that bag, what would take place at a two story brick house?
>
> A. That would be where the accounting was taking place. They would add up all the slips to see the writers had correctly tallied the number of slips and they would wait for the first number to come out and run through the slips for anything that would have that particular lead number so that—the main purpose for that is to add up the number slips to see the amounts are correct.

THE COURT: The money?

THE WITNESS: The tally of the slips, and with each runner, so they could settle at the end of the day or maintain the balance owed to whoever was who, but that is the accounting end of it there, and also when the complete number is out, they find out who has the hits and make preparation to pay the wagers.

Continuing his examination of the witness Ridolfi the District Attorney propounded this question (Tr. 38):

Q. You state the information was that these two, or just Mr. Whiting, was operating the business?

A. Mr. Whiting was operating the business, and Miss Killings was helping him, she was an employee of his, I presume, she was helping out.

Continuing, the witness Rodilfi, responding to questions propounded by the Court, said (Tr. 41):

THE COURT: So, the people subject to this tax, as I understand it, are the people that pick up the wagers themselves, the runner is not and the control man is not?

THE WITNESS: That's right.

THE COURT: And the backer, of course, is?

THE WITNESS: That's right.

THE COURT: He is known sometimes as the banker?

THE WITNESS: Banker or backer, the count house they refer to it.

THE COURT: People working in the backer's place where he does the accounting?

THE WITNESS: They are salaried employees.

THE COURT: Not subject to the stamp or occupational tax?

THE WITNESS: No, just the backer.

Proceeding relative to illegal execution of the warrant petitioners called Mrs. Mary Lille Proctor, owner of the premises raided and landlord of petitioner Whiting. Having testified she was present at the dwelling at the time of the raid she further stated:

Q. (Tr. 57—by Mr. McKenzie): Will you tell his Honor what they did and what happened?

A. Well, I hadn't long come in, sitting on the back porch, and then my daughter-in-law came over and we was sitting talking. * * * We were (Tr. 58) sitting there talking and while we were talking this man came right around the porch on us with his hand down in his pants, like this, don't move, don't move, don't move, and a gun, he was sticking up about that much, and at the time he was hollering, don't move, don't move, somebody around on my door—

THE COURT: Which door?

THE WITNESS: Well, it was a sound, I don't know if it was front door or back door at the time, but I don't know, it was at the door. I said, somebody is at my door, I want to let them in. He said, don't you move. And I started, I started away all right, but my daughter said, don't do it, she was so scared, she said, sit down, and then I stopped.

Q. Mrs. Proctor, thereafter did a number of men enter your home?

A. Yes.

Q. Five or six men?

A. Yes.

Q. What did they do when they got there?

A. They broke the front door, cut the screen on the front door, broke it in, and the kitchen door.

Responding to cross examination, at (Tr. 64) this witness stated:

Q. You say you saw his hand on his gun?

A. His hand right on the gun and all his stomach up here was shining.

Q. The gun was in a holster?

A. No, no, it wasn't, it was stuck down into his —you know how—

Q. His belt?

A. Yes, in his belt.

(Tr. 65) (Cross Examination):

Q. Did you hear voices at the front door?

A. After he said, don't move, don't move, I heard

a knock at the front door. I got up, I said, somebody at my door, and when I got up, he said, don't move.

A further preliminary motion, a plea in bar, attacked the prosecution upon the basis the Government had settled its accounts with the petitioners.

The plea in bar was predicated upon the following factual situation:

1. The petitioner Whiting came voluntarily to the Treasury Department to:

(a) Pay any tax owed,

(b) Whether or not he was a person required to obtain and pay for an Occupational Tax Stamp.

After various negotiations the Treasury Department decided:

(a) That his occupational activities were not of the type and character which would permit the issuance of an Occupational Tax Stamp to him;

(b) That his disclosure of earnings permitted the Government of the United States to tax him in the amount of $3136.00 and that

(c) The Government having heard him, upon his voluntary disclosure, required him to pay the amount of $3136.00, and advised him that he was not a person required to purchase the Occupational Tax Stamp in question.

Therefore, the question which the Courts below were required to determine was this:

The Citizen—tax payer—having fully and voluntarily advised the Government of his activities, his business and his earnings, was told that if he paid a certain amount of money, which he did pay, his obligations to the Government of the United States were satisfied.

It will be noted that in Chapter 63 of the Internal Revenue Code it is set forth that Taxes payable by stamp and unpaid shall be assessed, determined, and collected as set forth in the Statute.

It has been the contention of the Government and the holdings of the Courts below that the rights of the Federal Government may not be bartered away by any oral statement of a subordinate Governmental Agent.

However, the Prosecuting Agency—The Executive Department—; and the Determining Agency—the Judicial Department—have found it convenient to ignor that part of the law established by the Legislative Department which flatly states the Treasury Department, through its accredited agent, will determine liability—in every respect. Ergo, when the Petitioner Whiting went to the Treasury Department and advised that department of his activities; made application for stamp; paid all sums requested; and was advised that he was not a person entitled by his activities to receive and obtain a Tax Stamp he had placed himself in a position which made it morally and legally impossible for the prosecuting sovereign to complain that he had willfully disobeyed the commands of its statutes.

ARGUMENT

THE WARRANT ISSUED CONTRARY TO LAW, LACK OF PROBABLE CAUSE APPEARING UPON THE FACE THEREOF

In the affidavit submitted to the United States Commissioner, as part of the application for search warrant one affiant agent Bedingfield stated that he had received information from an undisclosed source petitioner Whiting had been upon a prior occasion a reputed numbers backer; not as of date of application for warrant.

This statement does not constitute sufficient legal evidence of the fact sought to be established; present status as banker.

Two agents, Bedingfield and Ridolfi affirmed that upon stated occasions they had observed—

A paper bag being delivered to Whiting at a time and place when Killings was with him—

That they had absolutely no knowledge of the contents of the bag—

That they had no knowledge the bag contained wagers—

That they had no knowledge Whiting or Killings ever accepted, or paid off, a wager—

That the business of keeping accounts of numbers lottery transactions was not that of being a banker.

There was no evidence of admissions or declarations against interest.

There was merely observation of transportation of suspected bookkeeping records without acceptance or payment of any wager.

This Court in Calamaro's case—United States v. Calamaro 354 U.S. 351, 1 L. ed. 2d 1394, 1400, 77 S. Ct. 1138 *held* a pickup man is not a person whose failure to obtain occupational stamp tax can be prosecuted criminally.

In Ingram v. United States, 360 U.S. 672, 3 L. ed. 2d 1503, 1511, 79 S. Ct. 1314, the Court again *held* proof of operation of a lottery contrary to provisions of local law governing lotteries does not authorize prosecution for violation of the federal stamp tax statutes, and by this criterion it was patent upon the face of the application for warrant the information contained therein did not spell out any offense against the United States.

Nor did the document establish that the requirements of Rule 41 of the Federal Rules of Criminal Procedure

had been obeyed. The paraphernalia sought was evidence of gaming not of willful tax evasion.

Ergo the denial of the motion of petitioners to suppress was in contravention of applicable decisions of this court and of rules of procedure promulgated by this court and having the force and effect of statutory law.

THE DENIAL OF PETITIONERS' MOTIONS REQUIRING DISCLOSURE OF THE IDENTITY OF ALLEGED INFORMERS WAS CONTRARY TO APPLICABLE DECISIONS OF THIS COURT

This Court in Roviaro v. United States, 353 U.S. 53, 1 L. ed. 2d 639, 645, 646, 77 S. Ct. 623, said in part:

> Where the disclosure of informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure, and, if the Government withholds the information, dismiss the action.

In Greene v. McElroy, 360 U.S. 474, 3 L. ed. 2d 1377, 79 S. Ct. 1400, this Court said that the right to be confronted by the witnesses whose alleged evidence is being used as a vital phase of a criminal prosecution, guaranteed by the Sixth Amendment to the Constitution of the United States must be obeyed—that faceless accusers may not testify in absentia after demand made for their identification and production as witness in the forum.

Here there was no showing that any possible informant might fear reprisals or anything of the like having been partially described as District of Columbia police officers.

If the motion had been then granted petitioners would have developed that the information relating to Bedingfield's informants would establish matters taking place in 1951—11 years prior to his utilization of it as being current.

When it is further realized that what was not then known to petitioners—the banishment of agent Bedingfield from the witness stand for uttering unreliable testimony—would and does demand corroboration of third party remarks narrated by him, the applicability of Roviaro and Greene, supra, becomes extremely vital to a fair trial under due process.

IT WAS CONTRARY TO APPLICABLE DECISIONS OF THIS COURT TO DENY PETITIONERS' MOTION TO SUPPRESS UPON THE GROUND THE WARRANT WAS EXECUTED CONTRARY TO LAW

The evidence conclusively establishes that when the United States Marshal in possession of the warrant sought admission the owner of the premises seated at another entrance, but close enough to hear the Marshal's knock, started to arise for the purpose of affording the Marshal immediate entrance; that immediately a Treasury Agent with hand on exposed pistol commanded the owner to remain quiescent if she desired not to be hurt; that no one denied the right of entrance or tried to prevent it; that 50 seconds subsequent to his original announcement the Marshal forced entry with a sledge hammer and a search and seizure ensued.

At page 6 of the opinion below the Court asserts that the Marshal had been denied entrance. This is fundamental error and is not supported by testimony or evidence.

In Miller v. United States, 357 U.S. 301, 2 L. ed. 2d 1332, 1340, 1341 78 S. Ct. 1190, this Court said in part:

> * * * Congress, codifying a tradition embedded in Anglo-American law, has declared in section 3109 the reverence of the law for the individual's right of privacy in his house. Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest

> against unlawful invasion of the house. The petitioner could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose. Because the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed.

How deftly and precisely the aforesaid language of this Court applies to the instant case.

Here, acting in concert, the United States Marshal and the Internal Revenue Agent, went to separate doors of the private dwelling. At the door where one person was observed sitting on a screened porch the Internal Revenue Agent appeared with exposed dangerous weapon. At the other door the Marshal went with his sledge hammer. The marshal knocked at the door before which he stood—the owner of the dwelling, heard his notice and request and started to arise and go to that door to admit the marshal. The Internal Revenue Agent admonished her not to move under threat of bodily harm. She obeyed his command and did not open the door for the marshal. Fifty seconds later he demolished the door by a very real trespass, and as soon as he had done so and made his entry the Special Agent advised the owner she was no longer under armed threat not to move.

The offense involved was a misdemeanor.

There was no warrant of arrest issued.

By reason of what the search disclosed there was an arrest.

The plain language of section 3109 proscribes the type of activity pursued in this case and the decisions of this Court demand that evidence thus seized be suppressed upon proper motion.

IT WAS CONTRARY TO APPLICABLE DECISIONS OF THIS COURT TO DENY THE PLEA IN BAR

The Government witness Joseph J. Marchioni, Revenue Agent, testified in substance that during the year 1951, the petitioner Whiting, requested that he be issued a required Occupational Stamp Tax; that he submitted evidence of earnings and activities; that he submitted the amount of $50.00 as payment for the Tax Stamp. That this sum was refunded.

In additional testimony the Government established the Treasury Department held the petitioner Whiting was not entitled to receive a stamp since from the information submitted by him it did not appear that he was one of the class to whom the law was applicable.

Nontheless the Treasury Department assessed him the sum of $3136.00 as a special assessment tax which sum he forthwith paid over, according to this revenue agent witness.

In Sections 6201—6203, Internal Revenue Code of 1954, cited supra, the Congress made special provision for assessments of taxes and collection of same by the Secretary or his delegate, where occupational tax stamps did not issue.

The Government did establish that the assessment and collection referred to supra were made under such statutory authority, and therefore, the valid legal conclusion to be drawn from this incident is: The determination by the Treasury Department of the application made by Petitioner, and its finding that he was not a person required to pay the Occupational Stamp Tax, and its collection of the money he had earned under a different Statute established as matter of law that the Government was barred from later attempting to convict of a wilful failure to abide by the provisions of Statutes the Sovereign had theretofore held were inapplicable to him and to his activities.

In the light of the Special Assessment statutes it cannot be maintained the Secretary of Treasury or his delegate was barred from assessing and collecting or that petitioner was without right to assert payment and inapplicability of the revenue act.

THE DENIAL OF PETITIONERS' MOTION FOR JUDGMENT OF ACQUITTAL WAS CONTRARY TO APPLICABLE DECISIONS OF THIS COURT

A rather amazing aspect of this cause is reflected in the language of the Trial Judge, speaking sua sponte, after verdict and before sentence as follows:

> THE COURT: Now, however, when the defendants in the case do not testify at all, the necessary result is that you have to deal with the case on the evidence that you have and not on what you might have hoped that it would be from the defendants. So that, I'm thinking particularly—well, particularly of this Defendant Killings. At this time I have not the remotest idea of her exact participation in this, what I suppose would be regarded as a gambling operation of some kind.

It is certain that since the proof and evidence before the Court prior to the time the case was submitted to the jury had left the Trial Court himself without the remotest idea of her exact participation in what the Court supposes might be regarded as a gambling operation of some kind, there was a complete failure to follow the criterion set forth by this Court in Calamaro and Ingram.

Where, prior to submission to a jury, there is ground to believe that reasonable men might differ respecting the probative force of evidence the denial of such a motion might be proper, but where in the opinion of the Trial Judge there is not the remotest reason for believing the evidence establishes anything pointing to guilt as alleged in the information, it is the paramount duty of the Trial

Judge to deny a jury the right to speculate, conjecture or guess. Pursuing the matter further the Court then said with respect to Whiting:

> * * * this (is) what I suppose would be regarded as a gambling operation of some kind.

In entertaining petitioner Whiting's motion for judgment of acquittal the Trial Judge being so uncertain that he could only imagine Whiting had been concerned in a gambling operation of some kind and did not state that he was of the opinion this petitioner was a person of the class ennumerated as a banker, rather than just a minor gambler, as provided in Calamaro and Ingram, supra, it was again the paramount duty of the Trial Court to grant the judgment of acquittal.

In fact it was unquestionably his duty to dismiss the matter of his own volition.

THE REFUSAL OF THE TRIAL COURT TO TAKE TESTIMONY UPON PETITIONERS' OBJECTION TO THE SEIZED EVIDENCE, AFTER ADVERSE RULING ON THEIR PRE-TRIAL MOTION TO SUPPRESS WAS CONTRARY TO APPLICABLE DECISIONS OF THIS COURT

At the time of the hearing upon the pre-trial motion to suppress neither the court nor the petitioners knew:

1. That agent Bedingfield—the only person who claimed to have information that petitioner Whiting had been a some-time banker—not a present banker of a lottery; had been forced to leave the witness stand in a gaming case in the District Court of the United States in Norfolk, Virginia, because his testimony was so biased, prejudiced and unworthy of belief the trial judge dismissed the case—wherefore his credibility and the existence and credibility of his informants assumed new importance.

2. That his informants had advised him that the activities they had ascribed to petitioner Whiting were of date eleven years prior to application for warrant, and neither agent Bedingfield nor his fellow agent Ridolfi had any knowledge of the activities of petitioners during the dates 1951 to 1960.

In Gouled v. United States, 255 U.S. 298, —— S. Ct. 298, 65 L. ed. 647, 652, 654, this Court said:

> * * * they (meaning search warrants) may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding * * *.
>
> The papers being of "evidential value only" and having been unlawfully seized, this question really is, whether, it having been decided on a motion before trial that they should not be returned to the defendant, the trial court, when objection was made to their use on the trial, was bound again to inquire as to the unconstitutional origin of the possession of them. It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore is not to be applied as a hard-and-fast formula to every case, regardless of its special circumstances. We think, rather, that it is a rule to be used to secure the ends of justice under the circumstances presented by each case; and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.

THE REFUSAL OF THE TRIAL COURT TO PERMIT INTERNAL REVENUE AGENT RIDOLFI TO STATE WHETHER THE PETITIONER KILLINGS WAS AN EMPLOYEE ONLY, WAS CONTRARY TO APPLICABLE DECISIONS OF THIS COURT

The witness, Internal Revenue Agent Ridolfi, was sworn and testified as an expert. While so testifying counsel for petitioners asked him whether or not when he was testifying during the hearing on the pretrial motion to suppress he had stated that as a result of his investigations he believed the petitioner Killings was merely an employee.

Objection was made and sustained.

Thereafter the Court examining this witness asked the witness whether or not, testifying as an expert, he had an opinion as to whether the petitioner Whiting was a Banker or a mere employee-bookkeeper, and the witness stated that it was his expert opinion the petitioner Whiting was a Banker and that such opinion was predicated upon the articles seized upon execution of the search warrant.

So the unique proposition appears: The opinion of the Government witness that one petitioner is a person covered by the applicable statute—being a banker—is admissible;

The opinion of the same witness that the co-defendant, is not a banker, is inadmissible.

In other words testimony tending to establish guilt is admissible; testimony tending to establish innocence is inadmissible.

In Alford v. United States, 282 U.S. 687, 75 L. ed. 625, 627, 629, the Court said:

> Cross-examination of a witness is a matter of right. * * * Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and of-

> fered of his reputation for veracity in his own neighborhood * * * that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment * * * and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased * * *.
>
> * * * * *
>
> The trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error.

REASONS FOR ALLOWANCE OF WRIT

Both the Trial Court and the Circuit Court of Appeals below have each and both decided applicable Federal questions in such a manner as to be in conflict with applicable decisions of this Court.

Below both the Trial Court and the Circuit Court of Appeals have so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

The Court below has pitched its opinion on determinations of fact and certifications of law which stand in absolute derogation of the rights guaranteed petitioners by those provisions of the Constitution of the United States herein cited, and by those opinions of this Court herein cited, and therefore require a supervisory and corrective settlement of the questions involved in this cause.

CONCLUSION

The vice in this prosecution—its corrosive effect upon the integrity of constitutional government, and the rights of the citizen to privacy—lies in the persisting attempt and determination to punish men for alleged violations of

internal revenue laws and regulations; when the true and real design and purpose of prosecution is to punish for violation of statutes with respect to which the federal government is devoid of jurisdiction.

Unless and until the internal revenue service becomes finally convinced this Court meant that its rulings in the Calamaro and Ingram cases, supra, had prospective effect and continuing applicability, the constitutional right of liberty shall depend upon the whim or caprice of any tax agent whom, being opposed to gaming proposes to punish that local offense by resort to prosecution for alleged tax offenses.

Persecution by the internal revenue service looms large in the fundamental reasons for the existence of this government and country. This court would honor its own functions and duties by insisting that the same agency may not destroy the nation's liberty, nor the smallest part of it.

Respectfully submitted,

T. EMMET MCKENZIE
412 Fifth St., N.W.
Washington 1, D. C.
Counsel for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8646.

United States of America,
Appellee,

versus

Orion T. Whiting, Jr., and Lucretia Killings,
Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
W. CALVIN CHESNUT, DISTRICT JUDGE.

(Argued October 1, 1962. Decided December 19, 1962.)

Before SOPER and BRYAN, Circuit Judges, and HUTCHESON, District Judge.

T. Emmett McKenzie for Appellants, and J. Hardin Marion, Assistant United States Attorney, (Joseph D. Tydings, United States Attorney, and Arthur G. Murphy, Assistant United States Attorney, on brief) for appellee.

SOPER, Circuit Judge:

Orion T. Whiting, Jr., and Lucretia M. Killings appeal from judgments of the District Court based upon a jury verdict whereby they were found guilty of receiving wagers in a lottery operation without having previously paid the special occupational tax and without having registered and furnished information with regard to the business as required by the federal statutes and regulations. (See 26 U.S.C. §§ 4401, 4411, 4412, 4901, 7203, 7262, and 7272. C.F.R. Title 26 § 325.50) Whiting was sentenced to imprisonment for one year and fined $10,000, and Killings was sentenced to imprisonment for 181 days and fined $1,000. The questions in issue relate to the validity and the execution of a search warrant, to the refusal of the Judge to order the disclosure of the names of the informers and to certain rulings on the admissibility of evidence, and to statements contained in the charge of the Judge to the jury.

A variety of circumstances led to the arrest of the defendants, the search of the defendants' premises and ultimately their conviction. Some time prior to June 1, 1960 agents of the Intelligence Division of the Internal Revenue Service received information from sources that had proved reliable in the past that Whiting and other persons were engaged in the operation of a lottery and that numbers slips regarding the daily wagers were being transported by automobile to a home on Leland Road in Prince Georges County, Maryland. Accordingly, two special agents, Bedingfield and Ridolfi, were assigned to investigate. They had been informed by sources previously found reliable that Whiting had a reputation in Washington, D. C. as a numbers backer and that he had admitted to Internal Revenue Agents that he was engaged in a lottery. The agents knew that in November 1951 Whiting had paid a 10% excise tax on wagers accepted by him in that month, in conformity with 26 U.S.C. § 4401,

and that at one time he had applied for a special occupational wagering tax stamp under 26 U.S.C. § 4411, but no stamp had been issued because of failure on his part to furnish the required information.

Accordingly, the agents kept watch on Whiting's movements on six days between June 1 and June 20, 1960. They observed that shortly before 3:00 P.M., on each of these days, Whiting would pick up his co-defendant, Killings, in his automobile at 14th Street and Saratoga Avenue in the city of Washington, and drive to a shopping center in Prince George's County where they would await the arrival of one C. J. Wilson, a convicted gambler, who would arrive about 3:30 P.M., in another automobile with a colored girl, and park at the shopping center about a block away from Whiting's automobile. The girl would then leave the Wilson car carrying a large brown paper bag folded at the top and walk to Whiting's car and enter it. Whiting would then drive to a point one block away from the Center, let the girl out, drive away with the bag to a two-story house on Leland Road and drive into the garage in the basement. Whiting and Killings would remain inside the house for approximately an hour and then leave. The agents knew that Killings previously had been arrested for operating a lottery and that neither Whiting nor Killings nor Wilson had paid the special occupational wagering tax for the current fiscal year.

Armed with this information, the agents applied to the U. S. Commissioner for a search warrant to search the Leland Road house. They made an affidavit in which they set out the information they had received and the observations they had made; the Commissioner, being of the opinion that probable cause had been shown, issued the warrant on June 22.

On the afternoon of June 24 Agent Ridolfi watched while Whiting and Killings, following their usual routine,

received a brown paper bag from Wilson and the colored girl and then drove to the house on Leland Road about 4:00 P.M. The search warrant was served shortly thereafter by two deputy marshals and six revenue agents. Several of the federal officers forcibly entered the house after they had disclosed their identity and had been refused admission. In a room on the second floor, they found numbers slips for June 24 spread out on the table and numbers slips for June 21, 22 and 23 in large brown paper bags and, in addition, adding machines and various items of gambling paraphernalia of the type normally used in numbers operations. The records disclosed a business of $2,000 a day with 65 writers and six to eight control men, to whom the writers report, engaged in the operation. The evidence indicated that in the lottery business the control men turn over the material to a pick up man, who delivers it to the banker.

The defendants endeavored unsuccessfully to suppress the evidence secured in the search by motions addressed first to the United States Commissioner at the preliminary hearing, and later to the District Judge in advance of the trial. Their contention is that these motions should have been granted because the search warrant was issued without probable cause. They rely on *Schenk* v. *United States*, 55 App. D.C. 84, 2 Fed. 185 (1924), where it was said that an officer of the law may not use information furnished him as a basis for a search and seizure, and should not act until he has secured the affidavit of his informer to the truth of the information, to be obtained if necessary, by subpoena to appear before the Judge or the Commissioner. This is no longer the prevailing rule either in the District of Columbia or elsewhere. It is now established that probable cause exists when the facts and circumstances within the officer's knowledge, and of which he has reasonably trustworthy information, are sufficient in themselves to warrant the belief of a man of reasonable

caution that a crime is being committed. *Brinegar* v. *United States*, 338 U.S. 160, 175-176; *Washington* v. *United States*, D.C. Cir., 202 F.2d 214, 215. Obviously, the information received by the agents in the instant case from previously reliable sources, supplemented by the knowledge acquired by the agents in their surveillance of the defendants' actions, furnished a sufficient basis for the finding of the Commissioner that there was probable cause for the issuance of a search warrant and also for the rejection by the court of the motion to suppress the evidence secured by the search.

The defendants further contend that the search warrant was illegally executed and, hence, the evidence obtained by the search should not have been admitted. The evidence on this point is not in dispute. The officers arrived at the house about 4:30 P.M. on June 24th. A Deputy Marshal knocked on the front screen door, which was locked, and announced in a loud voice that he was a United States Marshal with a search warrant. The wooden door was open and through the screen the Marshal could see persons scurrying around at the top of the steps leading to the second floor. He called to them to come down and open the door, but nobody came. After waiting about a minute, he broke through the screen near the lock, reached in and unlatched the door and entered. At the time one Mary Proctor, the wife of the owner of the house from whom the defendants rented one room, was seated with her daughter-in-law on a screened porch at the side of the house. One of the officers who had a gun sticking out of his belt covered this entrance and told Mrs. Proctor not to move when she started to get up after hearing someone knock at the front door. Her daughter-in-law told her to sit down, and she did so. The door to the side porch and to the house were not locked.

Defendants argue that if the officer had allowed Mrs. Proctor to go to the front door when she heard the knock,

she would have opened the door, and the need to use force would have been obviated. The relevant statutes are 18 U.S.C. §§ 3109 and 2234. Section 3109 provides that an officer armed with a search warrant may break open any outer door of a house to execute the warrant if after notice of his authority and purpose he is refused admittance.

Section 2234 provides that whoever in executing a search warrant wilfully exceeds his authority or exercises it with undue severity shall be fined not more than $1000 or imprisoned not more than a year. Defendants contend that the Federal agents used undue violence in breaking open the screen door at the front of the house and, hence, the search was illegal. We do not think that the Deputy Marshal went beyond the permission of the statute. He had identified himself and had given notice of his authority to enter and had been denied admittance; and he had no notice that anyone inside the house was willing to open the door. Under these circumstances his use of only so much force as was needed to effect an entrance was not unreasonable.*

On several occasions during the preliminary proceedings and in the trial before the jury, the defendants sought unsuccessfully to compel the Government to disclose the names of the informers whose information led to the investigation. Their attorney stated that he did not need the names of the informers in order to present an affirmative defense but in order to show that the information did not contain sufficient "actual representation"

* The opinion has been expressed that the use of unnecessary violence does not invalidate a search under a proper search warrant but merely subjects the offender to the penalties provided by § 2234. See *United States* v. *Freeman*, (D.C. 1957), 144 F. Supp. 669; *Barrientes* v. *United States*, 5 Cir., 235 F.2d 116, 117, cert. den. 235 U.S. 879.

to justify the issuance of the search warrant. We think there was no error in denying the names of the informers to the defendants. The Government is privileged to withhold the identity of persons who furnish information of infractions of the law to officials charged with its enforcement. The need to protect the sources of information which will enable the officers of the law to enforce the criminal law for the protection of the public has long been recognized. See *Roviaro* v. *United States*, 353 U.S. 53 (1957); *In re Quarles and Butler*, 158 U.S. 532 (1895); *Vogel* v. *Gruaz*, 110 U. S. 311 (1884). For an excellent historical discussion see the opinion by Justice Gray, *Worthington* v. *Scribner*, 109 Mass. 487; McCormick, *Evidence*, § 148; Uniform Rules of Evidence, Rule 36. It has been held, however, that the privilege must yield when the disclosure of the informer's identity is essential to the defense of the accused and to a fair determination of the cause. See *Roviaro* v. *United States*, 353 U.S. 53 (1957); *Scher* v. *United States*, 305 U. S. 251 (1938). In *Roviaro*, for example upon which the defendants particularly rely, the informer had helped to set up the occurrence which led to the prosecution for the illegal possession of narcotic drugs, and had been present when the crime took place and was the only witness upon whom the defendant could call to testify as to the transaction covered by the testimony of the Government witnesses. In the present case, however, we have no such situation for, as the attorney for the defendants admitted, the names of the informers were wanted in support of the effort to invalidate the search warrant and not to help the defendants in the presentation of their case.

Subsequently, the defendants' attorney, in his cross-examination of Agent Bedingfield in respect to his expert opinion of the defendants' gambling operation, sought to impeach the witness by asking him whether in another criminal case previously tried in the Eastern District of

Virginia he had not been asked by the District Judge to leave the stand because his testimony was unacceptable. The witness answered that the Judge had asked him to step down but had stated later to Treasury officials that he was probably in error in taking this action. In pursuing this line of cross-examination, the defendants' attorney offered the transcript of the proceedings in the earlier case, but the Judge refused to let the attorney pursue this collateral line of investigation. This decision was obviously correct. A witness may be questioned as to past misconduct even as to collateral matters in order to impeach his credibility; but the interrogator is bound by his answers and may not contradict him, and the extent of the examination is within the discretion of the trial judge. *Simon* v. *United States*, 4 Cir., 123 F.2d 85. In the pending case the agent answered the question and admitted that he had been asked to leave the stand in an earlier case. Under these circumstances the trial judge was entirely justified in refusing to admit the record of the earlier trial since it would have tended to confuse the jury as to the issues it was called upon to decide. The Judge's action is supported by abundant authority. *Herzog* v. *United States*, 9 Cir., 226 F.2d 561, 565; 235 F.2d 664; cert. den. 352 U.S. 884; *Travis* v. *United States*, 10 Cir., 269 F.2d 928, 938-40; *Nashville Interurban Railway* v. *Barnum*, 2 Cir., 212 Fed. 869, 873; *United States* v. *Bender*, 7 Cir., 208 F.2d 869, 873.

It is also contended that Judge Chesnut erred when he refused at the trial of the case to permit the attorney for the defendants to ask Agent Bedingfield on cross-examination in respect to the identity of the persons who informed him that Whiting was a banker in the lottery business. The attorney asserted that his purpose was to inquire into the validity of the search warrant. The Judge refused to permit this line of questioning because Judge Northrop, in a two-day preliminary trial proceeding in

the District Court, had entertained a motion to suppress the evidence obtained under the search warrant, had heard witnesses and argument on the motion and had held that the search warrant was valid. Judge Chesnut ruled that his colleague's determination should be accepted as final unless new evidence was presented. No such evidence was presented. Judge Chesnut's ruling was, therefore, correct. See *United States* v. *Wheeler*, 256 F.2d 745 (3 Cir. 1958); rehearing, 171 F. Supp. 278, 279-281; aff'd 275 F.2d 94, 97 (3 Cir. 1960); *Jennings* v. *U. S.*, 19 F.R.D. 311, 312, aff'd 247 F.2d 784, (D.C. CCA 1957); *Waldron* v. *United States*, 219 F.2d 37, 40-41. Cf. *Nardone* v. *United States*, 308 U.S. 338, 341-342.

The defendant Killings contends that she was prejudiced in her defense by the refusal of the District Judge to permit Agent Ridolfi to answer a question as to the part Killings had in the gambling operation. Agent Ridolfi was asked by defendant's attorney whether during his investigation he had expressed an opinion as to whether Mrs. Killings was a banker or an employee of the business. The U. S. Attorney objected to the question and was sustained by the Judge. The defendant's attorney was referring to an incident that occurred at the hearing before Judge Northrop of the motion to suppress the evidence when Agent Ridolfi testified that he had received information that Whiting and Killings were operating a numbers business and that Whiting was a principal in the business and that Mrs. Killings was aiding him as an employee. The ruling was correct. If the witness had answered the question, he would have given hearsay testimony. It was entirely proper for Agent Ridolfi to testify at the preliminary hearing that he had received information from trustworthy sources which led him to investigate and to swear out a search warrant. For this purpose, the hearsay was relevant, but it was not proper when the witness was testifying as to facts within his

own knowledge bearing on the criminal charge in trial before the jury. It is significant that although the agents were admitted to be experts qualified to express an opinion as to whether Killings was a banker or merely a banker's helper, neither agent was asked by either party to testify on this point. Agent Bedingfield did testify that in his opinion, based upon what he had seen, Whiting was a banker. However, no testimony was offered on behalf of either defendant.

The defendants moved the court to dismiss the information on the ground that the Government was barred or estopped from prosecuting them because in November, 1951, Whiting had applied for a wagering tax stamp, and his application had been refused. This matter was first brought to the attention of the court before the trial by a plea en bar. Evidence was taken which showed that an unsigned application on behalf of Whiting was filed accompanied by a payment of $50.00 which was retained pending investigation. After the expiration of the fiscal year (on June 30, 1952) for which the tax was paid, a return was filed on Whiting's behalf, and a 10% excise tax was paid for wagers accepted between November 1 and November 9, 1951. Thereafter, on May 21, 1953, the Internal Revenue Service returned $16.60 and retained $33.34 of the $50. payment for the two-thirds of the fiscal year from November 1, 1951 to June 30, 1952. No tax stamp was issued since the fiscal year had expired when the settlement was finally made in October 1952. The defendants' position seems to be that the Government is precluded from pressing the charges in the instant case relating to the year 1960 because it failed to issue the tax stamp for the fiscal year 1951-1952. The contention is so inapposite and futile that it need not be discussed.

The defendants finally complain of certain rulings of the Judge on requested instructions to the jury and of

certain portions of the Judge's charge. These matters may be disposed of summarily since as to each item the position of the defendants is entirely devoid of merit.

The Judge was asked to direct a verdict for the defendants even though the uncontradicted evidence was that they were in the numbers business and each day went to an appointed place to receive the wagers for the day preparatory to paying the winners. Despite this testimony and the undisputed testimony of the acknowledged experts that the activities which they witnessed constituted the operation of a lottery, the defendants insist that the Judge should have entered a directed verdict on their behalf. The contention answers itself.

The defendants took no exception to the Judge's charge although an opportunity to do so was offered to them and, therefore, they are precluded from objecting to it in this court, unless it should appear to the court that an error occurred which clearly prejudiced the defendants in the trial of the case. See Rule 30, Federal Rules of Criminal Procedure. *United States* v. *Borda*, 4 Cir. 285 F.2d 405, 407; *Coppersmith* v. *United States*, 4 Cir., 176 F. 2d 353, 354. We find no error in the charge which fairly presented the case to the jury.

The defendants say that the instruction in regard to the weight to be given to circumstantial evidence was incorrect because the Judge did not charge the jury in the language held to be desirable in *Cuthbert* v. *United States*, 278 F.2d 220, 224. The Supreme Court, however, has held in *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954), that this instruction is not required when the jury is properly instructed as to the standards for reasonable doubt, for in such case an additional instruction on circumstantial evidence is confusing and incorrect. In this instance, the Judge correctly instructed the jury, in effect, that whether the evidence was direct or circumstan-

tial the burden was on the Government to prove the defendants' guilt beyond a reasonable doubt and that unless the evidence as a whole left the jury with an abiding conviction to a moral certainty of the truth of the charge they should acquit.

An effort was made in the course of the argument to minimize the part played by Mrs. Killings in the operation of the business for the purpose of showing that she was not engaged in the business in some proprietary way. The testimony was, however, that the two defendants engaged in exactly the same activities. In each incident portrayed in the testimony they appeared and acted together. It is true that an expert opinion based on the evidence was given that Whiting was a banker and that no opinion on this point as to Killings was expressed. The fact is, however, that no opinion as to Killings' part in the business was asked; and, since the evidence as to each defendant was identical, the submission of the case to the jury as to each was required.

The Judge, however, was careful to follow the rulings laid down by the Supreme Court on the interpretation of the relevant statute in *United States* v. *Calamaro*, 354 U.S. 351, (1956), and *Ingram* v. *United States*, 360 U.S. 672 (1958). He called attention to the argument, on behalf of the defendants, that the evidence showed that any connection which they may have had with the business was merely subordinate, such as a pickup man, or messenger, or a bookkeeper; and he instructed the jury that they should acquit the defendants, or either of them, unless they should find that they were respectively engaged in the business as bankers, or writers accepting wagers from others, or acting in some proprietary way.

The judgment of the District Court is affirmed.

Affirmed.

JUDGMENT

Filed and Entered December 19, 1962.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8646

UNITED STATES OF AMERICA,
Appellee,

vs.

ORION T. WHITING, JR., AND LUCRETIA KILLINGS,
Appellants.

APPEALS FROM the United States District Court for the District of Maryland.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

MORRIS A. SOPER
United States Circuit Judge.

ALBERT V. BRYAN
United States Circuit Judge.

STERLING HUTCHESON
United States Circuit Judge.

Filed Dec 19 1962 R.M.F. Williams, Jr. Clerk

December 27, 1962, motion of appellants for stay of mandate filed.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	6
Conclusion	9

CITATIONS

Cases:	
Jones v. *United States*, 362 U.S. 257	6
Roviaro v. *United States*, 353 U.S. 53	7
Scher v. *United States*, 305 U.S. 251	7
Statutes:	
18 U.S.C. 3109	2, 6

676288—63

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 756

ORION T. WHITING, JR., and LUCRETIA KILLINGS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–12a) is not yet reported. The opinion of the district court on the motion for a new trial appears in the record (I R. 12–16).[1]

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1962. The petition for a writ of certiorari was filed on January 18, 1963. The juris-

[1] "I R." refers to the appellant's appendix, "II R." to the government's appendix in the court of appeals.

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the affidavit in support of the search warrant was sufficient.

2. Whether the search warrant was properly executed.

3. Whether various procedural rulings of the district court were proper.

4. Whether the evidence supported petitioner's convictions for wagering tax violations.

STATUTE INVOLVED

18 U.S.C. 3109 provides as follows:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioners were convicted on all four counts of an information charging various violations of the wagering tax law. Petitioner Whiting was sentenced to imprisonment for one year and a $10,000 fine. Petitioner Killings was sentenced to imprisonment for 181 days and a fine of $1,000 (I R. 2–4, 90). The court of appeals affirmed (Pet. App. 1a–12a).

1. Petitioners filed a pre-trial motion to suppress evidence seized under a search warrant, alleging that the affidavit in support thereof was not based upon the personal information of the affiants, did not identify the alleged source of information and did not state facts sufficient to support the inference that petitioners were engaged in business as principals, and that the warrant was illegally executed by the officers' breaking the door without announcing their authority (I R. 5–7). After a hearing the motion was denied (I R. 9). The motion was renewed at the trial, but the court indicated that it would adhere to the prior ruling unless new evidence was offered (I R. 59–60). The pertinent testimony may be summarized as follows:

a. The affidavit for search warrant, executed by special agents Ridolfi and Bedingfield of the Internal Revenue Service, stated that they were assigned to the case after information from a source previously proved reliable had been received that petitioner Whiting and others were engaged in a numbers lottery; that the wagers were transported by automobile to a described house located on Leeland Road in Prince George's County, Maryland; that the files of the Metropolitan Police Department contained many complaints that Whiting was a "backer" in the numbers racket; that several years previously Whiting had applied for an occupational tax stamp for wagering, which was refused because he did not supply full information; that an investigation of crime in the District of Columbia in the United States Senate had

developed that Whiting was in the numbers business (II R. 1–2).

The affidavit further alleged that, on several different days in June 1960, the agents observed the movements of petitioners, which followed a consistent pattern: About 3:00 p.m., Whiting would pick up petitioner Killings near Fourteenth Street and Saratoga Avenue, Northeast, in Washington; they would then drive to a shopping area in Suitland, Maryland, and park a block away from another automobile driven by Carl Wilson, a known gambler. A girl would get out of Wilson's car, carrying a large brown paper bag and go to petitioners, who would drive her to the Silver Hill Road intersection and let her out, minus the paper bag. Petitioners would then proceed to the house on Leeland Road and disappear into the garage. The records of the Internal Revenue Service did not show that any wagering occupational tax stamp for the current year had been issued to any of the parties named (II R. 2–7).

b. As to the execution of the search warrant, a deputy marshal testified that he, another deputy, and three Internal Revenue agents went to the premises, a brick home which had a screen door at the front entrance. The deputy marshal rapped on the front door and in a loud, clear voice announced that he was a United States marshal with a search warrant (II R. 25, 33). One of the agents shouted a moment later (II R. 25, I R. 46). People were noted scurrying around on the second floor and the deputy marshal

shouted for some one to come down and open the door (II R. 26, 28, 29, 36; I R. 41). After waiting some time to give someone an opportunity to come (II R. 12, 28), the officers punched a hole through the screen and unlatched the door. The wooden door was open (II R. 26–27, I R. 46).

The owner of the house, a Mrs. Proctor, who was not actually living in the house (I R. 39), testified that she had come over to sit on a side porch and was joined by her daughter-in-law (I R. 37, 39). While they were there, a man came around to the porch from the outside with his hand on his gun and said, "Don't move." The witness heard someone at the front door and wanted to let whoever it was in, but the man told her not to move. She did start to go, but her daughter told her not to (I R. 37, 40–41).

The officer who approached Mrs. Proctor said that he had his hand on his gun because a dog at the side of the house had growled at him. He told the women to sit down, that there was a federal raid in progress. He heard the officers call that they were federal officers with a search warrant. When they called the second time without apparent response, he told Mrs. Proctor to go and open the door, but then he heard them entering (II R. 32–33). The officers went upstairs and found petitioners and a large quantity of gambling paraphernalia of a type normally found in the bank of a numbers operation (I R. 47–48).

2. The trial developed the facts as to the daily movements of petitioners in the manner described in the affidavit (II R. 49–57). The paraphernalia seized

included adding machines, a large number of numbers slips, an empty paper bag approximately the size of those which were daily observed and another paper bag with a date on it (II R. 57–64). An analysis of the numbers slips showed an average daily business of approximately two thousand dollars and indicated that there were about sixty-five writers turning in slips (II R. 91–92).

ARGUMENT

1. The affidavit for the search warrant was clearly sufficient. Information that petitioners were engaged in gambling was corroborated by the officers' personal observations of the activities of petitioners, which were consistent with their operation of a gambling enterprise. See *Jones* v. *United States*, 362 U.S. 257, 267–272.

2. The evidence is clear that the officers did make an announcement of their office and purpose before breaking open the door. The officers waited some time before breaking open the door because they did see someone on the second floor of the house (II R. 28, 29, 36).[3] Under these circumstances, as the courts below held, the officers properly complied with 18 U.S.C. 3109 (see p. 2, *supra*).

---

[3] We do not see how the situation is altered by the evidence (see p. 5, *supra*) that an officer directed the two women sitting on the side porch, who did not actually live in the house, to refrain from opening the front door, since the actual occupants of the house, who were obviously more directly concerned with the raid, were given an opportunity to respond to the officers' announcement of identity and purpose.

3. (a) At the hearing on the motion to suppress (see I R. 9) and at the trial (I R. 58) petitioner sought the names of the informants whose information had sparked the investigation. Petitioner's counsel admitted that the names were not necessary to enable the defendant to put on a defense (I R. 61). Since the information received merely stimulated an investigation and was confirmed by other evidence, notably the personal observations of the officers, the court properly ruled that the names of the informants did not have to be disclosed. *Scher* v. *United States*, 305 U.S. 251, 254; see *Roviaro* v. *United States*, 353 U.S. 53, 59.

(b) By a motion before trial designated as a "plea in bar," petitioner Whiting claimed that the information against him should be dismissed. He based this contention on the fact that in November 1951 (1) an application for a wagering tax stamp was filed on behalf of Whiting and returned because unsigned and incomplete and (2) Whiting had paid $2,400 for the 10 percent tax on wagers accepted (II R. 38–40). Obviously the rejection of an incomplete application in 1951 and the payment of taxes in that year did not give Whiting immunity from paying taxes on his 1960 activities.

(c) At the hearing on the motion to suppress, Agent Ridolfi, one of the agents applying for a search warrant, testified that the other agent, Mr. Bedingfield, had received information that petitioners were operating a numbers business in Maryland. When asked whether the information the agent had re-

ceived related to the two, or just Whiting, he answered "Mr. Whiting was operating the business and Miss Killings was helping him, she was an employee of his, I presume, she was helping him out" (II R. 20). At the trial, agent Ridolfi was asked whether in connection with his investigation he had formed or theretofore expressed an opinion as to whether Mrs. Killings was a banker or employee. The court ruled the question improper (I R. 71), as it clearly was. The agent was being asked to testify, not as an expert based on the evidence at the trial, but merely as to his prior statement, which related solely to the content of certain information another agent had received.

4. The evidence was sufficient to support the verdict of the jury that both petitioners were actively engaged in the business of accepting wagers without paying the required tax. The slips picked up at the time the search warrant was executed showed business of approximately $2,000 a day, involving about 65 writers. Whiting obviously knew about the tax stamp requirement since he had tried to obtain a stamp in 1951, and Mrs. Killings admitted that she knew of the requirement (II R. 78). The jury were carefully told to acquit unless they found that the defendants "were respectively engaged in the business as bankers or writers, accepting wagers from others or in some proprietary way" (II R. 114). The evidence against petitioners was substantially the same and nothing was offered to suggest that one was in a position inferior to the other.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

FEBRUARY 1963.

U.S. GOVERNMENT PRINTING OFFICE: 1963

Office Supreme Court, U.S.
FILED
FEB 28 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 756

ORION T. WHITING, JR., and LUCRETIA KILLINGS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. EMMETT MCKENZIE
412 Fifth Street, N.W.,
Washington 1, D. C.
Counsel for petitioners.

SUBJECT INDEX

	Page
REPLY TO POINTS RAISED IN OPPOSITION.	
Respondent's contention	
Re: Application for search warrant	1-3
Re: Execution of warrant	3, 4
Re: Motion to suppress	4, 5
Re: Plea in Bar	5
Re: Denial of right to cross-examine Government witness	5, 6
Re: Insufficiency of evidence	6-8
Conclusion	8

CASES CITED

Curley v U. S., 181 US App. D.C. 389, 160 F 2d 229	7
Greene v McElroy, 360 US 474, 3 L ed 1377, 79 S Ct. 1400	4
Jones v U. S., 362 US 257	3
Riggs v U. S., 280 F 2d 949	7
U. S. v Calamaro, 354 US 351, 77 S Ct. 1138, 1 L ed 2d 1394	2, 6
U. S. v Consolidated Laundry Corp., 301 F 2d 563	7
White v U. S., 279 F 2d 740, 748	7

IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 756

ORION T. WHITING, JR., and LUCRETIA KILLINGS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In seriatim petitioner replies to respondent's argument, thusly:

1. SUPPORTING AFFIDAVIT RE: APPLICATION FOR SEARCH WARRANT.

Respondent states "Information that petitioners were engaged in gambling was corroborated by the officers' personal observations of the activities of petitioners, which were consistent with their operation of a gambling enterprise. See Jones v United States, 362, U.S. 247, 267-272.

Concern with—engagement in—operation of a gambling enterprise, *alone*, sans acceptance of wagers violates no federal statute petitioners were charged with having violated.

In United States v Calamaro, 354 US 351, 77 S Ct. 1138, 1 L ed 2d 1394, 1397, this Court said, re liability under the statutes here in question:

> "* * * the government has to argue that the wager is received a second time when the writer hands the yellow slip to the pick-up man. But we think this ignores the very real difference between a wager and a record of a wagering transaction. It is the banking record and not the wager which the pick-up man receives from the writer and transmits to the bank. The pick-up man no more receives wagers than a messenger, who carries records of customers transactions from a branch bank to a central office, receives deposits." 236 F2d at 184, 185.

The record in this cause shows:

1. Persons delivered bags to petitioners—contents unknown.

2. Whatever the contents they had been received at a time and place prior to delivery to petitioners.

3. Assuming arguendo they contained wagers—those had been received by others.

Delivery of the bags did not constitute acceptance of a wager.

Petitioners picked up and transmitted to a counting house the records of wages made—the statutes in question did not apply to them under the rationale of the Calamaro case, supra.

There was no evidence remotely tending to show that at the place where petitioners took the bags any other person ever appeared to make a wager or collect a wager.

There was no scintilla of evidence that wagers were paid off at that place.

Every piece and parcel of evidence established that at that place the auditing or book-keeping was conducted—

nothing more. Ergo, observations establishing that petitioners received something from persons suspected of having received wagers at a time and place prior to and other than the place of observation, can at most constitute evidence of pick-up activities; wherefore petitioners are not subject to the penalties of the statutes in question.

Jones v United States, 362 U.S. 257, 267-272 avails respondent not at all.

There the seizure was of narcotics—contraband under all circumstances.

> There (p. 271) * * * we may assume that Didone (affiant officer) had the day before been told, by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. Had that been all, it might not have been enough; but Didone swore to a basis for accepting the informant's story. The informant had previously given accurate information.

In the present cause the informants spoke of matters many years past. They did not claim to have been privy with petitioners in any violation of law—at any time—or at any place.

They did not speak of *knowledge of anything* desired to be reached by warrant that established violation of the statutes in question. As per the respondent's brief the matter sought had to do with indicia of violations of local gambling statutes and nothing more.

2. AS TO EXECUTION OF WARRANT.

The officer who broke into the establishment stated he waited between 50 and 60 seconds—this is not denied.

The officer who came to the door where persons were seated who were willing and eager to open a door stated he warned them not to move under penalty of bodily harm—after demand for entry had been made—empha-

sizing the compelling quality of his order with show of a dangerous and loaded weapon. This is not denied.

What is contended is that failure to admit—forthwith—notwithstanding the threat of being shot if any move to admit was made—constitutes refusal after the law enforcement agent demands admittance and that therefore 18 USC 3109 sanctions forcible entry.

Neither this Court, any Circuit Court of Appeals, any District Court, or any State Court has ever thus interpreted the right of forcible entry.

3. HEARING ON THE MOTION TO SUPPRESS.

The government, seizes upon the alleged proposition petitioners stated their desire to know of the identities of informers, upon pre-trial motion to suppress, were not identified with any trial defense.

Such knowledge is vital at pre-trial, not less than defense, and this Court in Greene v McElroy, 360 US 474, 3 L ed 1377, 1390, 1391, 79 S Ct 1400, said:

> * * * where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, (as, for instance, affidavits supporting application for search warrant) it is even more important where the evidence consists of the testimony of individuals whose memories might be faulty or who, in fact, might be purjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. * * * They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him."

Prior to interposing any affirmative defense the right to destroy the government's alleged case, through cross examination of hostile witnesses—actually confronted in

a judicial forum—supports the constitutional right guaranteed by the Sixth Amendment.

And the more so when the principal witness wears the credentials of credibility of the government witness Bedingfield.

3b. PLEA IN BAR.

In 1951 petitioner Whiting applied for stamp as required by the statute in question.

Issuance was denied.

Tax was imposed by the collector there upon monies petitioner said he had earned in gambling activities—withal not accepting wagers.

Tax was collected, not under the statutes involved in this prosecution by the government but under another statute.

Subsequent activities of the same nature were deemed proof beyond a reasonable doubt of "willful" violation of the statutes here in question.

Where in judicial literature can be found a definition of "willful" stating that failure to obey a statute the sovereign says does not apply to an individual is a crime?

3c. DENIAL OF RIGHT TO CROSS-EXAMINE GOVERNMENT WITNESS.

This contention, it will be observed, introduces a new element into the right of cross-examination.

The Revenue Agent witness testified as an expert that in his opinion a gambling enterprise was conducted at the premises searched.

He had expressed an opinion that the petitioner Whiting was a banker; he was then asked his opinion as to the co-petitioner Killings.

At a prior judicial hearing of the case against her this witness had testified that in his opinion she was helping Whiting out as an employee.

In Grunewald v United States, 351 US 391, 77 S. Ct. 963, 1 L. ed 2nd 931, 951, this Court said:

> It is, of course, an elementary rule of evidence that prior statements may be used to impeach the credibility of a criminal defendant or an ordinary witness.

It is elementary that the expert witness may be interrogated as to his opinion on all phases of his testimony in chief.

4. INSUFFICIENCY OF EVIDENCE

The evidence established at best participation in a gaming enterprise.

The claim here made by the respondent is in direct conflict with United States v Calamaro, 354 US 357, 77 S. Ct. 1138, L. ed 2nd 1394, 1397.

Here the Court said among other things:

> "Thus, the government has to argue that the wager is received a second time when the writer hand the yellow slip to the pick-up man. But we think this ignores the very real difference between a wager and a record of a wagering transaction. It is the banking record and not the wager which the pick-up man receives from the writer and transmits to the bank. The pick-up man no more receives wagers than a messenger, who carries records of customer transactions from a branch bank to a central office, receives deposits."

Animadverting to the refusal to grant a motion for judgment of acquittal this ruling is in conflict with rulings in other Circuits and with rulings on the same question in its own Circuit, as follows:

White v United States, 279 F 2d 740, 748, CCA 4—1960

> (6-7) * * * Upon consideration of the motion for judgment of acquittal, * * * the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt. Bell v United States, 4 Cir. 1950, 185 F 2d 302. (And cases cited).

United States v Consolidated Laundries Corp., 301 F 2d 563, 574 CCA 2—1961:

> (20) * * * defendants contend that the trial court erred in refusing to apply the reasonable doubt test in ruling upon their motion for acquittal at the close of the government's case. Judge Palmieri held that the applicable standard is whether he *could*, not whether he *would* find the accused guilty on the government's evidence. * * * We agree with it.

Riggs v United States, 280 F 2d 949, 953, —— CCA 5—1960

> (1-3) * * * on motion for judgment of acquittal * * * the Court's function, so it has been said, is to find whether or not, taking the view most favorable to the Government, there is substantial evidence to support a verdict of guilty (citing Glasser v United States, 1942, 315 US 60, 80, 62 S Ct. 457, 86 L ed. 680 * * *, means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (Citing—Consolidated Edison Co., of New York v National Labor Relations Board, 1938, 305 US 197, 229, 59 S Ct. 206, 217, 83 L ed. 126). The "conclusion" of a jury returning a verdict of guilty is that of guilt beyond a reasonable doubt.

And see Curley v United States 1947, 81 US App. D.C. 389, 160 F 2d 229.

It will be noted that the cases cited establish in those circuits that the Court must find where he denies such a motion that there is substantial relevant evidence which

would justify the conclusion of a jury of guilt beyond a reasonable doubt.

How can it be successfully asserted here that the Judge so found? His own statement was that he had found no evidence of definitive value; that as to the petitioner Killings he had no idea of what her activities had been and that as to petitioner Whiting he guessed that this petitioner had been engaged in some aspect of a gambling operation. It is critical to note that he never said he had any idea there was substantial evidence which would justify a conclusion beyond a reasonable doubt that the petitioner had violated the statutes in question.

CONCLUSION

Such use of the taxing power as is here exhibeted subjects every citizen to a clear and present danger of being prosecuted criminally for possible violation of statutes of local nature, only. The taxing power has shown in the Calamaro and Ingram cases, supra, a disposition to abuse their legal authority; and protection of the entire public requires that such convictions receive the consideration of this Court.

Respectfully submitted,

T. EMMETT MCKENZIE
412 Fifth Street, N.W.,
Washington 1, D. C.
Counsel for petitioners.

LIBRARY

Office-Supreme Court, U.S.
FILED
MAR 28 1963
JOHN F. DAVIS, CLERK

No. 756

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

ORION T. WHITING, JR., AND LUCRETIA KILLINGS,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR RECONSIDERATION OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

T. EMMETT MCKENZIE,
412 Fifth St., N.W.,
Washington, D. C.,
Counsel for Petitioners.

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

	Page
Factual Statement of matter deemed adequate to support request for reconsideration	1-7
CONCLUSION	7

CASES CITED

Douglas v. California, No. 34, October Term, 1962	5, 6
Draper v. Washington, No. 201, October Term, 1962	6
Fay v. Noia, No. 84, October Term, 1962	6
Gideon v. Wainwright, No. 155, October Term, 1962	6
Lane v. Brown, No. 283, October Term, 1962	6
Lehigh Mining and Manufacturing Company v. Kelly, 160 US 327	4
Mapp v. Ohio, 367 US 643	2, 3
McNutt v. General Motors Corp., 298 US 178	4
Texas v. Florida, 306 US 398	4
Townsend v. Sain, No. 8, October Term, 1962	5
United States v. Sturm, 180 F 2d 413	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 756

ORION T. WHITING, JR., AND LUCRETIA KILLINGS,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR RECONSIDERATION OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

To the Honorables: The Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petitioners, Orion T. Whiting, Jr., and Lucretia Killings, pray that this Court reconsider its prior decision in this cause and Order that the petition for writ of certiorari be granted.

BASIS FOR RECONSIDERATION

The text for this application is found at page 6 of the opinion below, as follows:

> Section 2234 (U.S.C.) (18) provides that whoever in executing a search warrant wilfully exceeds his authority or exercises it with undue severity shall be fined not more than $1000 or imprisoned for not more than a year.

This language was deemed properly and legally dispositive of the contention that in execution of the search warrant the federal officers had violated section 3109, title 18, U.S.C. in that while one raider with side arm exposed warned the owner of the house not to respond to the demand for entry his companion demolished a door with a sledge hammer and gained entry by force and violence and without sanction of the warrant.

On page 6 of the opinion below this is said:

> He (meaning a United States Marshal) had identified himself and had given notice of his authority to enter *and had been denied admittance.* (Underscoring supplied).

The record and transcript does not reveal that admittance had been denied—it reveals a breaking with force and violence within 50 to 60 seconds of notice of identity; and entry not refused.

Notwithstanding that law is not a frozen block of statutes, rules, decisions and constitutional limitations, petitioners find it impossible to glean from examination of the authorities set forth by this Court that the constitutional right to be secure in houses, papers and effects may be disregarded, at will, by raiding federal officers with the only protection afforded the suspected citizen the faint and delusory possibility the sovereign violating constitutional guarantees in a determination to obtain evidence might see fit to criminally prosecute its own agent —its own aider and abettor.

In Mapp v Ohio, 367 US 643, 81 S Ct 1684, 6 L ed 2d 1081, 1086, this Court dealing with evidence obtained in violation of constitutional provisions, said, in part:

> * * * the Court * * * clearly stated that use of the seized evidence involved "a denial of the constitutional rights of the accused." * * * It meant, quite simply, that "conviction by means of unlawful seizures and enforced confessions * * * should find no

> sanction in the judgments of the courts * * *," Weeks v United States, supra (232 US at 392), and that such evidence "shall not be used at all". Silverthorne Lumber Co. v United States, supra (251 US at 392).

Punishment of a federal officer violating the commands of Amendment IV., and 18—3109 USC affords the wronged citizen neither protection nor redress; and an attempt to remove Amendment IV., from the Constitution and substitute therefor 18 USC 2234 should be totally abortive ab initio.

In the seventh circuit, 180 F 2d 413, 416—United States v Sturm, a different view was taken supported by citations from this Court, as follows:

> * * * the deprivation of a constitutional right ousts the jurisdiction of the District Court * * * where the violation of a right asserted by the accused bears a causal relationship to his subsequent conviction. Mooney v Holohan, 294 US 103, 55 S Ct 340, 79 L ed 791, 98 ALR 406, (conviction based on testimony known by prosecution to be perjured); Brown v Mississippi, 297 US 278, 56 S Ct 461, 80 L ed 882, (conviction based on estorted confession); Johnson v Zerbst, 304 US 458, 58 S Ct 1019, 82 L ed 1461, 146 ALR 357, (accused denied assistance of counsel); Chambers v Florida, 309 US 227, 60 S Ct 472, 84 L ed 716, (conviction based on coerced confession); McNabb v United States, 318 US 332, 63 S Ct 308, 87 L ed 819, (conviction based on incriminating statements obtained from defendant in unlawful manner.

Certainly enough has been alleged by petitioners to bring into sharp focus the question of jurisdiction—a question which will not supply its own answer, sans any inquiry.

This court has upon many occasions spoken of what's to do when questions of jurisdiction arise whether initially upon trial or later upon appeal.

In Lehigh Mining and Manufacturing Company v Kelly, 160 US 327, 336, 337, 16 S Ct 307, 40 L ed 444, the Court said:

> But when the inquiry involves the jurisdiction of a federal court,—the presumption in every state of a cause (is) that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record.

In Texas v Florida, 59 S Ct 563, 82 L ed 817, 306 US 398, 405, the court said:

> While the exceptions do not challenge the jurisdiction of the Court, the novel character of the questions presented and the duty which rests upon this Court to see to it that the exercise of its powers be confined within the limits prescribed by the Constitution make it incumbent upon us to inquire of our own motion whether the case is one within its jurisdiction.

In McNutt v General Motors Corp. 56 S Ct 780, 80 L ed 1135, 298 US 178, 184, the court said:

> The Act * * *, in placing upon the trial court the duty of enforcing the statutory limitations as to jurisdiction by dismissing or remanding the cause *at any time when the lack of jurisdiction appears*, applied to both actions at law and suits in equity. The trial court is not bound by the pleadings of the parties, but may of its own motion, if led to believe that its jurisdiction is not properly invoked "inquire into the facts as they really exist."

Petitioners argue therefore:

The question of ouster of jurisdiction attendant upon deliberate and violent violation of constitutional privileges and guarantees is present in this cause as a lively and unanswered factor—

That they have a constitutional right to have that question resolved.

It is unfortunate that a nation which devotes so much of its time, energy and wealth in exporting to far away

places its concept of democracy and constitutional liberty is not able to afford every citizen an highest-court review of his complaint of illegal and unconstitutional criminal prosecution by the sovereign; notwithstanding this court cannot possibly command the personnel, time and energy which review of every citizen's case would require.

But by the standards utilized by this Court in determining what cases it will consider of sufficient importance, petitioners believe they should have the writ of certiorari.

In the segregation-desegregation cases the persons affected are many and their problems appear in every part of the nation. But the persons affected are a minority.

The persons subject to oppression by the internal revenue agents are no minority.

They outnumber any other class in society.

The possible effect of illegal revenue agent activities is a clear and present danger upon the liberty and property of all.

In affording alleged communists the opportunity to have their political liberty determined by the court of last resort the court afforded a minority group protection to the end that the majority might learn wherein it might find its protection.

But if petitioners may not have their constitutional guarantees determined by the highest court when beset by eager tax gathers how shall the majority tax payers learn of their rights in case of difference of opinion between collector and payer?

But days ago, this Court in Townsend v Sain, no.8, October Term, 1962, reversed and remanded in a matter which had to do with a conviction dependent upon evidence alleged to have been illegally obtained.

In Douglas v California, no. 34, October Term, 1962, the writ issued where it was asserted failure to appoint

counsel led to a conviction in violation of constitutional principles.

In Fay v Noia, no. 84, October Term, 1962, the writ issued where the pressing allegation of petitioner was a coerced confession and where the Court at p. 7, said in part:

> These are not extravagant expressions. Behind them may be discerned the unceasing contest between personal liberty and government oppression.

In Gideon v Wainwright, No. 155, October Term, 1962, the determining factor was alleged denial of a request by an indigent defendant for appointment of counsel. This Court's regard for due process and for the Bill of Rights there upset a conviction obtained in violation of constitutional guarantees.

In Draper v Washington, no. 201, October Term 1962, a refusal to furnish petitioners with a sufficient transcript of trial proceedings at State expense was deemed a sufficient constitutional infirmity to warrant issuance of the writ.

In Lane v Brown, No. 283, October Term, 1962, denial of a transcript upon attempted appeal from a judgment dismissing a petition for writ of error coram nobis—a collateral proceeding dependent upon a prior criminal conviction—was sufficient to invoke the aid of this court.

Each and every involved due process and the Bill of Rights.

In each and every of the causes the alleged errors were held to properly raise questions relative to lack of jurisdiction where constitutional guarantees had been denied.

Petitioners seeking light and guidance from the decisions and opinions of this Court as of March 18, 1963 cannot escape bewilderment, nor resist making a further effort for relief by certiorari.

Certainly the Hindu segregation of populace into "untouchables" and others has no application to applicants for relief in this Court, no petitioner is *ipso facto* unworthy.

There is no doubt that the Declaration of Independence and the preamble to the Constitution of the United States and the Bill of Rights therein contained have informed the petitioners that in nothing controlled or operated by the federal government need they fear less favored treatment—but they feel that although the promise stands forth very clearly; performance in this instance has failed to keep pace with the promise.

CONCLUSION

If admitted gun-play in support of a violent breaking and entering into the residence of a citizen, is not enough to warrant a decision from the court of last resort petitioners and their counsel must confess a failure to properly grasp the philosophy and purpose of this court's labors in behalf of justice and constitutional liberty.

The act, the principle, and the effect upon the rights and liberties of the people all join in pleading for review in this cause.

Respectfully submitted,

T. EMMETT MCKENZIE,
412 Fifth St., N.W.,
Washington, D. C.,
Counsel for Petitioners.

Counsel for petitioners certifies that this petition is presented in good faith and not for delay.

T. EMMETT MCKENZIE,
Counsel for Petitioners.